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Supreme Court, U.S.
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No. 88-1450

IN THE SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM, 1988

DURA-CORP, a Pennsylvania Business Corporation,

Petitioner

vs.

RISI STONE LTD., A Canadian Corporation and ROTHBURY INVESTMENTS, LTD., a Canadian Corporation,

Respondents

ON APPEAL FROM THE UNITED STATES COURT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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A. QUESTIONS PRESENTED FOR REVIEW

While Respondents contend that the Petitioner has not properly preserved for review several of the issues presented in its Petition, Respondents accept the statement of the Questions Presented contained in Petitioner's Petition for Writ of Certiorari insofar as it lists issues to be discussed and opposed by the within Brief.

B. LIST OF PARTIES AND RULE 28.1 LIST

Respondents accept the list of parties as stated in Petitioner's Petition.

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E. OPINIONS OF THE LOWER COURTS

Respondents accept the citation to the opinions of the lower Courts as stated in the Petition for Writ of Certiorari.

F. STATEMENT OF JURISDICTION

Respondents accept the Statement of Jurisdiction contained in the Petition for Writ of Certiorari.

G. CONSTITUTIONAL PROVISIONS, TREATIES AND STATUTES INVOLVED

Respondents accept the Verbatim Reproduction of Constitutional Provisions, Treaties and Statutes Involved in the Petition for Writ of Certiorari.

H. STATEMENT OF THE CASE

On November 16, 1983, Thomas R. Eddy, Kenneth R. Dehus and Angelo Risi entered into the agreement attached to Plaintiff's Amended Complaint in the District Court (345a, 311a-330a).[1] Mr. Risi supplied the typed portion of the Licensing Agreement on behalf of Risi Stone, Ltd., as proposed language for the Licensing Agreement between the parties (345a-346a). Thomas R. Eddy, an attorney, reviewed the proposed Licensing Agreement prior to its execution by the parties and made hand-written revisions and additions thereto (346a). Attorney Eddy did not make any revisions to the Licensing Agreement pertaining to Paragraph 28 thereof which states:

28. Arbitration

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1 References are to the appendix to the appeals in The United States Court of Appeals for the Third Circuit.

> Any dispute, difference or question arising between Risi and Licensee concerning the interpretation, construction, meaning or effect of this Agreement or any part thereof shall be referred a single arbitrator if Risi and Licensee agree upon such arbitrator or failing such Agreement to a board of three (3) arbitrators, one (1) to be appointed by Risi; one (1) to be appointed by Licensee; and one (1) to be appointed by the two (2) arbitrators so named by Risi and Licensee. The provisions of the Arbitrations Act of the Province of Ontario shall be applicable. (324-325a, 345a-347a).

Plaintiff, Dura-Corp, Petitioner herein, initiated a Declaratory Judgment action in the Federal District Court for the Western District of Pennsylvania as Licensee pursuant to the above-referenced Agreement (303a-336a). Defendants then filed a motion inter alia for a stay of the declaratory judgment action pending arbitration of the dispute between the parties. In support of Defendants' motion, Defendants filed the affidavit of

Angelo Risi (345a-347a). Prior to the entry of the District Court Order granting Defendants' Motion for Stay, no affidavits were filed on behalf of Plaintiff, Dura-Corp in support of its contention that the instant case should not be referred to arbitration or opposing the location of the arbitration. Only after Plaintiff, Dura-Corp, Petitioner herein, had appealed the District Court's Order to the Third Circuit of Appeals, did Petitioner file affidavits with the District Court purportedly opposing the location of the arbitration.

Petitioner Dura-Corp's Statement of the case in this Court makes numerous allegations not of record either in the Third Circuit Court of Appeals or in the District Court. Petitioner, as it did before the Third Circuit, alludes to allegations contained in its Amended Complaint and Petitioner's own briefs

filed in the District Court. These assertions do not constitute facts of record which should be considered by this Court. Because the declaratory judgment action below was disposed of on Defendants' Motion for Stay, the citations to Plaintiff's Amended Complaint and Briefs are improper. The alleged "facts" cited by Petitioner are in dispute; however, because of the disposition of this case on motion, Defendants were not required to answer the Complaint or refute the naked allegations contained in the briefs which were not verified by affidavit. Therefore, the only key facts relevant to the current Petition for Writ Certiorari include the arbitration clause (quoted herein and attached to Plaintiff's Amended Complaint) and the affidavit of Angelo Risi which was timely filed prior to the District Court's ruling on the arbitration issue.

I. SUMMARY OF ARGUMENT

Petitioner's attempt to obtain review by this Court is flawed on both procedural and substantive grounds. First, Dura-Corp waited until the filing of its Petition in this Court to first raise Constitutional arguments, and accordingly has not properly preserved those points for this Court's review. Second, despite citing two Constitutional provisions in the initial portion of its Petition as required by Supreme Court rules, Petitioner never explains in the argument section of the Petition how and why the District Court and Third Circuit decisions violate the cited Constitutional provisions.

Third, review of the Petition should be denied based upon principles of estoppel. Briefly stated, Petitioner now seeks to advance an argument as the basis for obtaining review that it vehemently

opposed in the United States Court of Appeals for the Third Circuit. More specifically, in the Court of appeals, Respondents, Risi Stone, Ltd. and Rothbury Investments, Ltd., argued that Dura-Corp's appeal of the District Court's Stay Order was barred by the reasoning of the recent Third Circuit decision in Zosky v. Boyer, 856 F.2d 554 (3rd Cir. 1988) and Petitioner Dura-Corp opposed this same argument. In an amazing and complete reversal of position, Petitioner now asserts that Zosky controls and that the District Court's order was not appealable as it is an interlocutory order. Simply stated, Petitioner attempts to take a further appeal to this Court in order to argue that the very Order that it originally appealed from is not an appealable order after all.

Fourth, Dura-Corp's Petition fails on substantive grounds as well. The District

Court's Order granted a stay of proceedings and directed that arbitration take place in Ontario, Canada pursuant to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter referred to as "The Convention"). A stay of the action under the Convention is entirely appropriate as the Convention is incorporated with relevant sections of the Federal Arbitration Act providing for a stay of proceedings upon application of a party to an agreement. Moreover, to effectuate the intent of the Convention a Federal Court must compel arbitration outside of its own district when it enforces an agreement of the parties to arbitrate a controversy outside the United States. Therefore, the District Court's stay of proceedings and direction that arbitration take place in Ontario, Canada is not only permitted under the Convention, but encouraged under

established precedent of this Court supporting the national policy favoring arbitration of disputes of this type.

J. ARGUMENT

(1) THE PETITIONER HAS FAILED TO PROPERLY RAISE BELOW AND PRESERVE CONSTITUTIONAL ISSUES NOW ASSERTED IN PETITIONER'S PETITION FOR WRIT OF CERTIORARI.

(a) Petitioner did not raise the points below that the District Court's Order granting a stay of proceedings pending arbitration was unconstitutional, or, that the District Court's finding of a Canadian forum for arbitration was unconstitutional.

Dura-Corp cites the Supremacy Clause of Article VI of the Constitution as well as Fourteenth Amendment Privileges and Immunities Clauses in its Petition for Writ of Certiorari. U.S. Const., Art. VI, cl.2; U.S. Const., Amend. XIV, sec.1. While listing these provisions, Petitioner never discusses them in its argument and

never explains how or why those Constitutional provisions as applied to the facts of this case justify review by this Court. Moreover, no Constitutional argument was properly raised and preserved by Petitioner below in either the District Court or the Court of Appeals.

This Court has held on several occasions that arguments not addressed in the District Court or the Court of Appeals will not be reviewed absent exceptional circumstances. United States v. Lovasco, 431 U.S. 783, 52 L.Ed.2d 752, 97 S.Ct. 2044, 2048 fn. 7 (1977); Johnson v. Transportation Agency, Santa Clara County, California, ___ U.S. ___, 107 S.Ct. 1442, 1446 fn. 2., 94 L.Ed.2d 615 (1987) (Constitutional issue not considered when not raised below). No exceptional circumstances exist here. Therefore, Petitioner may not rely upon the Constitutional provisions cited as an

afterthought to its unsuccessful non-constitutional arguments advanced in the Court of Appeals. As this Court stated in Miree v. DeKalb County, Georgia:

> [t]he fact that this asserted basis of liability is so obviously an afterthought may be some indication of its merit, but since it was neither pleaded, argued, nor briefed either in the District Court or in the Court of Appeals, we will not consider it.

Miree, 433 U.S. 25, 53 L.Ed.2d 557, 97 S.Ct. 2490, 2496 (1977). Similarly, in the case at bar, Petitioner may not now attempt to formulate a Constitutional argument for the first time to obtain review in this Court.

(2) THE PETITIONER SHOULD BE ESTOPPED FROM RAISING ARGUMENTS CONTRARY TO THE POSITION IT ADVANCED IN THE COURT BELOW IN ORDER TO NOW SEEK REVIEW BY THE SUPREME COURT.

Petitioner Dura-Corp devotes a large portion of its Petition for Writ of Certiorari to the issue of the

appealability of the District Court's Order subsequent to the Third Circuit decision of Zosky v. Boyer, 856 F.2d 554 (3rd Cir. 1988). Unlike the Constitutional provisions discussed above which were raised for the first time in this Court, the apppealability of the District Court Order was raised on appeal before the Third Circuit. However, it was Appellees, Respondents herein, Risi Stone, Ltd. and Rothbury Investments, Ltd., that raised the issue and argued that the Zosky case, supra, and this Court's ruling in Gulfstream Aerospace Corp. v. Mayacamas Corp., ___ U.S. ___, 108 S.Ct. 1133, 99 L.Ed.2d 296 (1988), rendered the District Court's stay Order a non-appealable interlocutory order.

In a complete reversal of position, Petitioner, Dura-Corp, which prosecuted the appeal despite the Zosky opinion and opposed Respondents' Motion to Dismiss the

appeal or jurisdiction grounds, now asserts that its initial appeal was improper. Petitioner now seeks Supreme Court review apparently to obtain a ruling that its appeal was improperly taken in the first place from a non-appealable interlocutory order of the District Court.

Petitioner's assertion of this argument demonstrates the frivolous nature of the instant Petition for Writ of Certiorari. By making this argument, Petitioner seeks an order that is moot and would not change the result reached by the lower Courts or the rights and liabilities of the parties under existing lower Court Orders. Kremens v. Bartley, 431 U.S. 119, 136 97 S.Ct. 1709, 1718-19, 52 L.Ed.2d 184 (1977) Currently, the District Court's order staying proceedings and directing the parties to arbitration, as affirmed, requires that the parties arbitrate their dispute. If Petitioner ultimately secured

an order from this Court holding that the initial Order of the District Court to arbitrate was not properly appealable, Petitioner would still be required to proceed to arbitration under the same District Court order. Thus, the review sought by Petitioner does not present a justifiable "case or controversy" and no useful purpose can be served by presenting the appealability argument to this Court. Kremens, supra.

Moreover, in the circumstances, Petitioner's opposition to dismissal of the appeal pursuant to the Zosky case below constitutes a waiver of that issue. See Steagald v. United States, 451 U.S. 204, 208-211, 68 L.Ed.2d 38, 101 S.Ct. 1642, 1645-47 (1981); United Stated v. Ortiz, 422 U.S. 891, 898, 95 S.Ct. 2585, 2589, 45 L.Ed.2d 623 (1975). Accordingly, Petitioner Dura-Corp should be estopped from asserting a contrary position before

this Court in a frivolous attempt to obtain further review of the appealability issue.

(3) THE ORDERS BELOW STAYING PROCEEDINGS PENDING ARBITRATION AND DIRECTING ARBITRATION TO TAKE PLACE IN ONTARIO, CANADA WERE A PROPER APPLICATION OF THE CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS AND THEREFORE ARE NOT A PROPER SUBJECT OF REVIEW IN THIS COURT.

Rule 17.1 of the Rules of the Supreme Court of the United States makes it clear that review by writ of certiorari is discretionary and that such a writ will only be issued when special and important reasons are presented by the Petitioner. In the current case, Dura-Corp's Petition clearly fails to satisfy any of the criteria for review outlined in Supreme Court Rule 17.1.

(a) The supervisory powers of this Court should not be invoked because the lower Courts properly stayed the proceedings and directed the

parties to arbitration pursuant to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

Petitioner urges this Court to exercise its supervisory powers claiming that the Stay Order entered below is inconsistent with the Convention. Indeed, Petitioner states "the issue in the case at bar is whether an order granting a defensive §3 motion to stay proceedings is inconsistent with §208 of the Convention." (See Petition, p. 26, fn. 4). Such an argument demonstrates a complete misunderstanding of the scope and application of the Convention, the terms of which are cited by Petitioner in its Petition. Moreover, this position taken in the Petition is not supported by applicable precedent, including that cited and relied upon by Petitioner.

Petitioner Dura-Corp attempts to argue that because the Convention does not

contain a provision for stay of arbitration, such an order is inconsistent with the Convention. This argument clearly ignores §208 of the Convention cited by Petitioner. Section 208 provides:

> Chapter 1 [The Federal Arbitration Act, 9 U.S.C.A §1 et seq.] applies to actions and proceedings brought under this Chapter [The Convention, 9 U.S.C.A. §201 et seq.] to the extent that Chapter is not in conflict with this Chapter [The Convention, 9 U.S.C.A. §201 et seq.] or the Convention as ratified by the United States.

9 U.S.C.A. §208. Therefore, the stay provision of the Federal Arbitration Act, 9 U.S.C.A. §3, is incorporated into the Convention. This concept has been recognized and discussed by the United States Court of Appeals for the Fifth Circuit in Sedco, Inc. v. Petroleos Mexicanos Mexican National Oil Company:

> Thus §201 provides that the Convention 'shall be enforced by United States courts.' In substance, the Convention

> replicates the Federal Arbitration Act. Indeed, §208 of the enabling legislation for the Convention incorporates all of the Convention into Chapter 1 of Title 9. But while the Convention requires Courts of the United States to enforce arbitration clauses along lines similar to those specified in the arbitration act, its reach is broader than the Arbitration Act. Both the Arbitration Act and the Convention provide that if a dispute in a pending lawsuit is subject to arbitration, the District 'shall on application of one of the parties stay the trial of the action until such arbitration has been had.' ... Section 206 of the enabling legislation for the Convention also authorizes District courts to order parties to proceed with the Convention arbitration even outside the United States.

Sedco, Inc. v. Petroleos Mexicanos Mexican National Oil Company, 767 F.2d 1140, 1146 (5th Cir. 1985) (emphasis added). Thus, the grant of a defensive motion for stay under the Convention as incorporated into the Federal Arbitration Act is appropriate and entirely consistent with the express language and intent of the Convention.

This view is also in accord with the strong public policy in favor of international arbitration. See Scherk v. Alberto-Culver Co., 417 U.S. 506, 94 S.Ct. 2449, 41 L.Ed.2d. 270 (1974).

Even the precedent cited by Petitioner does not support its position. Petitioner cites McCreary Tire and Rubber Co. v. CEAT, 501 F.2d 1032 (3rd Cir. 1974) in support of its argument that a stay order is inconsistent with the Convention. (See Petition, p.27). Petitioner's quotation of that opinion is out of context, citing only from a portion of the opinion dealing with foreign attachment. The portion of the McCreary opinion dealing with international arbitration, however, supports the entry of a stay pending arbitration in the case at bar. Specifically, the Third Circuit Court Appeals in McCreary held that the District

Court committed error by failing to grant a stay under the Convention.

> The enactment of Pub. L. 91-368, providing a federal remedy for the enforcement of the Convention, including removal jurisdiction without regard to diversity or amount in controversy, demonstrates the firm commitment of the Congress to the elimination of vestiges of judicial reluctance to enforce arbitration agreements, at least in the international commercial context. It was error to deny the motion for stay in disregard of the Convention.

McCreary, 501 F.2d at 1037 (citations omitted). Thus, the trial Court Order staying proceedings pending arbitration is consistent with the Convention and clearly not a departure from the accepted and usual course of judicial proceedings so as to justify the exercise of this Court's power of supervision.

(b) Petitioner fails to present any conflict between the lower Court orders in this case and relevant decisions of this Court or

between The Circuit Courts of Appeals on the forum non conveniens issue.

Petitioner's citation of this Court's decision in Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 67 S.Ct. 839 (1947) is not relevant to or in conflict with the applicable caselaw concerning arbitration. Moreover, while Petitioner makes passing reference to a conflict between the lower courts' rulings pursuant to the Convention and some New York cases, said conflict is not discussed or readily apparent from a review of the argument section of Dura-Corp's petition. Therefore, there is no conflict justifying review in this Court.

This Court's decision in Gulf Oil Corp. v. Gilbert, supra, pre-dates enactment of the Federal Arbitration Act and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. While the decision discusses the doctrine of forum non conveniens, it clearly has no

application to the parties' choice of a site for arbitration and is clearly distinguishable from the case at bar. Therefore, Gulf Oil clearly does not support Petitioner's assertions that the District Court was "Constitutionally obliged to weigh the jurisdictional contacts of the parties in order to determine the appropriate forum for arbitration." Petition, pg. 31.

The decision below staying proceedings pending arbitration and directing that arbitration take place in Ontario, Canada clearly is in accord with later decisions of this Court establishing a liberal federal policy favoring arbitration agreements. See Scherk v. Alberto-Culver Co., 417 U.S. 506, 94 S.Ct. 2449, 41 L.Ed.2d. 270 (1974); Moses H. Cone Memorial Hospital v. Mercury Corp., 460 U.S. 1, 103 S.Ct. 927, 941 (1983). Moreover, the District Court's

determination that arbitration should be conducted according to an agreement is a preliminary one that must be made on the facts as presented by the movant, in this case pursuant to the affidavit of Mr. Angelo Risi for Risi Stone, Ltd. and Rothbury Investments, Ltd. PAS-EBS v. Group Health, Inc., 442 F. Supp. 937, 940 (S.D. NY 1977), citing, Prima Paint Corp. v. Flood Conklin Mfg. Co., 388 U.S. 395, 403-404, 87 S.Ct. 1801, 1806, 18 L.Ed.2d 1270 (1967).

Finally, Petitioner presents no conflict among the United Stated Circuit Courts of Appeal which would justify review in this Court. Petitioner cites several District Court opinions, but fails to highlight any split among the Circuit Courts which is ripe for review on the forum non conveniens issue.

The courts which have considered the doctrine of forum non conveniens in the

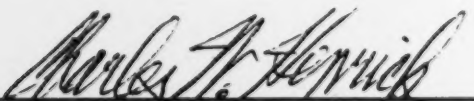
context of a site for arbitration have found that the doctrine is either not applicable to arbitration, or, only applicable to where to the Federal Court action to compel arbitration should be prosecuted. See Spring Hope Rockwool v. Industrial Clean Air, Inc., 504 F.Supp. 1385, 1389 (E.D. NC 1981) (application of the forum non conveniens doctrine not authorized under the Arbitration Act); Maria Victoria Naviera S.A. v. Cementos Del Valle, 759 F.2d. 1027, 1031 (2nd Cir. 1985) (federal court forum for petition to compel arbitration subject to doctrine but distinguished from location of the arbitration itself). In the circumstances, Petitioner has failed to present a conflict sufficient to support review in this Court pursuant to Supreme Court Rule 17.1.

CONCLUSION

For the foregoing reasons, Respondents, Risi Stone, Ltd. and Rothbury Investments, Ltd., respectfully request that Dura-Corp's Petition for Writ of Certiorari be denied.

Respectfully submitted,

DICKIE, McCAMEY & CHILCOTE, P.C.

By 

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